UNITED NATIONS

AT

Administrative Tribunal

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21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 784

Case No. 861: KNOWLES

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Raymond R. Knowles, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal until 31 December 1994, 31 March and 31 July 1995;

Whereas, on 17 May 1995, the Applicant filed an application containing pleas which read, in part, as follows:

> "4. ... [his] ... classification appeal filed on 24 August 1988 had not been considered by the Classification Appeals and Review Committee until June 1994. ...
>
> ...
>
> 6. ... The Applicant ... requests the Tribunal to hold that, regardless of the merits of his classification appeal, his rights as a staff member have been seriously violated by the failure of the Classification Appeals and Review Committee to hear his appeal for over five years. The Applicant respectfully requests the Tribunal to award him equitable compensation for the long delay in hearing his classification appeal in recognition of the fact that, because of the excellence of his performance, he was kept in the post under appeal for nine years and not allowed to transfer to a post which would have allowed advancement to the P-5 level.

...

9. ... the Applicant reiterates the plea ... that his post be reclassified to the P-5 level retroactively to the date of his appeal and that he be awarded equitable compensation for the violation of his contractual rights, a violation which had seriously impaired his prospects for promotion over a prolonged period of time.

10. In addition, the Applicant respectfully draws the attention of the Tribunal [to certain annexes to his application] ... which show that on 14 November 1989, the then Assistant Secretary-General for Human Resources Management, an ex-officio member of the APB [Appointment and Promotion Board], in spite of the pendency of the Applicant's classification appeal, advised the Chairman of the Appointment and Promotion Board that the Applicant's claim to reclassification of his post and to promotion to the P-5 level were without merit (...). Although the Applicant in his appeal to the Joint Appeals Board pleaded that the memorandum of the ASG [Assistant Secretary-General] (...) constituted improper and arbitrary action and an abuse of power, the JAB's report (...) gave no consideration to that aspect of the Applicant's appeal. The Applicant, therefore, respectfully requests the Tribunal to do so. ... The Applicant maintains that as a result of the ASG's memorandum to the APB, his recourse for promotion did not receive the fair and objective consideration to which he was entitled according to the applicable rules and procedures and that as a result he was denied an opportunity for advancement. In fact, the Applicant subsequently learned that the APB was favourably disposed to his recourse, but upon receiving the memorandum of the ASG (...) decided not to add his name to the P-5 promotion roster.

...

14. Applicant respectfully requests the Tribunal to ... award the Applicant an appropriate amount of compensation, representing the difference between the salary and allowances he actually received and the salary and allowances he would have received, as well as the difference in pension benefits, had the Assistant Secretary-General for Human Resources not destroyed with an untrue statement (...) any chance of success that his recourse to the APB in 1989 may have had, and recourses in subsequent years as well. ... The total compensation requested is US$ 132,000.

...

26. In the matter of the Compensation and Classification Service classification of his post, the Applicant respectfully requests the Administrative Tribunal to determine that the Service erred in the manner in which it analysed the Applicant's post, to recognize the impact of that error on the career prospects of the Applicant and to establish and award to him compensation for lost benefits to include salary, entitlements and future pension benefits, in recognition of the failure of the Compensation and Classification Service to properly classify his post.

..."

Whereas the Respondent filed his answer on 15 June 1995;

Whereas the Applicant filed written observations on 15 August 1995;

Whereas the Applicant filed additional documents with the Tribunal on 11 October 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 10 March 1969, on a three-month fixed-term contract, as a Technical Editor in the Reports and Documentation Section, in the Office of Technical Cooperation (OTC), Department of Economic and Social Affairs, at the P-3, step I level. His fixed-term appointment was extended successively through 30 June 1975. On 5 February 1973, the Applicant's functional title was changed to Programme Management Officer and he was reassigned within OTC to the Africa Branch, Physical Resources Projects Section. On 1 July 1975, he was given a probationary appointment. On 15 September 1975, the Applicant was reassigned, within OTC, to the Middle East, Mediterranean Europe and Interregional Projects Branch, Regional and Interregional Projects Section. On 1 April 1976, his appointment was made permanent and on 1 April 1978, he was transferred to the Department of Technical Cooperation for Development (DTCD). On 1 April 1979, he was promoted to the P-4 level. With effect from 1 July 1979, the Applicant was reassigned to the Middle East Section. On 10 February 1982, his functional title was changed to Economic Affairs Officer.

On 9 May 1984, DTCD submitted to the Compensation and Classification Service (CCS) a job description for post number UA-07460-E-P-4-006, "Economic Affairs Officer", encumbered by the Applicant. The post was reclassified by the CCS on 26 June 1984, as "Information Officer", at the P-4 level.

On 18 August 1984, the Applicant submitted to the Assistant Secretary-General, Office of Human Resources Management (OHRM), a request for the reclassification of his post to the P-5 level. On 29 August 1984, the Applicant was advised by the CCS that it had agreed to change the title of the post from "Information Officer" to "Publication Officer" in the occupational group of Editor. The Applicant was further advised that if he did not agree that his post was properly classified at the P-4 level, his case would be transmitted to the Classification Appeals and Review Committee (CARC). On 10 September 1984, the Applicant requested the CCS to forward his appeal to the CARC.

On 26 February 1985, the Applicant was informed by the Assistant Secretary-General, Personnel Services, that the CARC had completed its review of his classification appeal and had concluded that his post should remain classified at the P-4 level.

On 3 June 1988, DTCD submitted to the CCS a revised job description of the Applicant's P-4 post "Publication Officer", with the request that it be reclassified, since the previous job description had not adequately reflected the duties and responsibilities of the incumbent. DTCD noted that, in the publication field, those duties and responsibilities could be equated to those of a Managing Editor.

On 14 June 1988, the CCS again classified the post at the P-4 level and did not change its functional title.

In a communication dated 24 August 1988 to the Assistant Secretary-General, OHRM, the Applicant appealed the classification of his post at the P-4 level, based on a comparison of his job with that of Editor, United Nations Chronicle, Department of Public Information (DPI), which was classified at the P-5 level. In a

reply dated 20 October 1988, the Assistant Secretary-General, OHRM, informed the Applicant that "[his] second appeal against the classification decision, ha[d] been referred to the Classification Appeals and Review Committee".

On 19 December 1988, the Applicant asked for an administrative review of the classification of his post in accordance with staff rule 111.2. By memorandum dated 22 December 1988, the Assistant Secretary-General, OHRM, informed the Applicant that the Chairperson of the CARC would schedule his appeal hearing as soon as the backlog of outstanding appeals had been eliminated.

On 1 November 1989, the Chairman of the Appointment and Promotion Board (APB) advised the Assistant Secretary-General, OHRM, that it had been brought to the APB's attention that the Applicant was performing functions that were very similar to functions performed by the Editor-in-Chief, DPI. He requested OHRM to review this matter.

On 14 December 1989, the Assistant Secretary-General explained to the Chairman of the APB, that the CARC had determined that the Applicant did not have the same programme responsibilities as the Editor in the DPI post, despite an apparent similarity of functions. The Assistant Secretary-General, OHRM, stated that "we are, ..., as a rule, avoiding to determine the grading of a post solely by reference to other posts, particularly those with similar programme responsibilities, as such an approach would produce inconsistent results."

On 11 February 1992, the Applicant wrote to the Assistant Secretary-General, OHRM, requesting permission to examine the Classification Unit's file concerning his classification appeal.

Not having received a reply, on 14 April 1992, the Applicant wrote again to the Assistant Secretary-General, OHRM, requesting that the latter initiate the reclassification of his post to the P-5 level.

On 13 May 1992, the Assistant Secretary-General, OHRM, replied that since the backlog of outstanding appeals had been

eliminated, the Applicant's appeal would be scheduled for review when the new membership of the CARC was finalized.

On 23 July 1993, the Applicant wrote to the Secretary-General requesting administrative review of "the continuing failure of the Classification Appeals and Review Committee, ..., to review the classification appeal which I submitted to it in 1988, almost five years ago, requesting classification of my post to the P-5 level."

On 14 October 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The CARC submitted its report on 5 July 1994. It concluded that "the functions of the post correspond to the P-4 level. Therefore, the Committee recommends that the classification decision of 14 June 1988, with respect to the post, be maintained". On 7 July 1994, the Director of Personnel, OHRM, transmitted to the Applicant a copy of the CARC's report and notified the Applicant that she accepted the CARC's recommendation of 5 July 1994.

The JAB adopted its report on 1 September 1994. Its considerations and recommendations read, in part, as follows:

> "...
>
> 35. The Panel carefully examined the Respondent's explanations for the delay. It took note of the Respondent's statement, namely, that 'unfortunately, inadequate resources for the enormous size of the work Programme made such prompt consideration impossible. It is regrettable that the Appellant's appeal was not disposed of before the membership of the CARC expired, but the heavy task of the CCS in handling its work Programme prevented the preparation of the CCS's submission in the appellant's case and the subsequent consideration by the CARC, in the course of the review process.
>
> 36. The Panel, however, had expected that the Administration would act more expeditiously in reviewing the reclassification cases by the CARC so that a staff member would not have to wait such a long time. Nevertheless, the Panel noted that the record demonstrates that there were no improper, arbitrary actions constituting an abuse of power on the part of the Administration.

37. The Panel, therefore, adhered to the Tribunal's jurisprudence that it will not award compensation to an Appellant for delay unless he proves that he has suffered injury as a result. The Panel noted that in this case, the Appellant's situation has not been affected by the delay.

38. The Panel took note of the Respondent's statement that the membership of the new CARC was announced on 17 September 1993, in ST/IC/1993/51. The Panel expects the Appellant's appeal will be dealt with promptly and be given full priority.

39. The Panel made no other recommendation."

On 4 October 1994, the Under-Secretary-General for Administration and Management notified the Applicant as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's finding that there were no improper or arbitrary actions constituting an abuse of power on the part of the Administration and that the Board made no recommendation in support of your claim for compensation since, in its view, your situation had not been affected by the delay. The Secretary-General therefore agrees with the Board's findings and recommendation."

On 17 May 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The appeal process was unacceptably slow. This undermined his right to appeal an administrative decision, which is an integral and essential part of his rights as a staff member, and he should be compensated for this delay.

2. The recommendation of the CARC that the Applicant's post be classified at the P-4 level violated his contractual rights to have his post properly classified. The Applicant should be awarded equitable compensation for this violation.

Whereas the Respondent's principal contentions are:

1. Delay in the finalization of the Applicant's classification appeal caused him no loss. Thus, the decision not to award him compensation did not violate his rights.

2. The Applicant's appeal against the classification of his post was properly considered by the CARC which accorded the Applicant due process.

3. The CARC delivered a reasoned recommendation, the acceptance of which did not violate the Applicant's rights.

4. The Applicant has not discharged the onus placed upon him to establish prejudice or improper motive.

The Tribunal, having deliberated from 29 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant's claim is twofold. The Applicant appeals from a decision of the Respondent dated 4 October 1994. That decision adopted a unanimous Joint Appeals Board (JAB) recommendation that no further action be taken with respect to the Applicant's challenge to the action of the Administration in maintaining his P-4 grade level. The Applicant argues that the handling of his appeal against the classification of his post which was filed on 24 August 1988 and heard by the Classification Appeals and Review Committee (CARC) only in June 1994, was unacceptably slow and that he should be compensated for this delay. His second claim deals with the classification of the post itself. He argues that the CARC's recommendation that his post be classified at the P-4 level was not correct. In addition, due to the long delay, the CARC had by default, forfeited its rights to oppose the Applicant's claim for reclassification of his post to the P-5 level. The Applicant further claims that, in its analysis, the CARC applied more

stringent standards to the Applicant's post. In so doing, the CARC exceeded its authority and used improper means to deny the Applicant the correct classification of his post.

The Applicant also asserts that a memorandum written on 14 November 1989, by the Assistant Secretary-General for Human Resources Management (ASG/OHRM), advising the Chairman of the Appointment and Promotion Board (APB) that the Applicant's claim to the P-5 classification post was without merit, constituted improper and arbitrary action and an abuse of power.

II. The first issue before the Tribunal is whether the Respondent's decision to accept a JAB recommendation not to award damages for excessive delay in the hearing of the Applicant's classification appeal violated his rights. The second issue is whether the decision of the Respondent to accept the CARC's recommendation not to change the classification of the Applicant's post was vitiated by improper motives, thereby violating the Applicant's rights.

III. The Respondent in his answer argues that, since the Applicant's post was not reclassified, he did not sustain loss and, consequently, he is not entitled to compensation.

IV. In reviewing its jurisprudence concerning the issue of delay, the Tribunal recalls Judgement No. 414, Apete (1988) in which it held that the applicant was entitled to compensation for unconscionable delays caused by the Respondent in the administration of justice. In so doing, the Tribunal adopted its findings in Judgement No. 353, El-Bolkany (1985), in which it stated that an inordinate delay not only adversely affects the administration of justice, but on occasions can inflict unnecessary anxiety and suffering on an applicant.

Again, in Apete, the Tribunal held that "no extreme burden of work sustained by the representative of the Respondent can excuse such an unconscionable delay of almost three years, merely for the preparation of a rebuttal. Nor can the Tribunal subscribe to the contention that there is no proof of fault on the part of ... in causing the delay."

V. In the present case, it is the Tribunal's view that the Administration denied the Applicant due process in taking so long to consider his appeal. As pointed out by the JAB, all staff members are entitled to a prompt resolution of disputes. Although the Tribunal is fully aware of the Administration's problems arising from the inadequacy of resources, which resulted in this delay, this does not absolve it of its responsibility to hear appeals in an expeditious manner.

Due to the delay, the Applicant was left in great uncertainty as to his career and he was inhibited from taking steps which might have advanced his position in the Organisation. He is entitled to compensation for the general injury and anxiety which he has suffered.

VI. The Tribunal now turns to the issue of the classification of the post. The Tribunal does not have the authority to interfere with job classification matters. Its role is limited to determining whether improper motives, prejudice or arbitrariness have vitiated the contested decision. The Applicant contends that the CARC applied, in certain instances, more stringent definitions than those contained in the International Civil Service Commission Master Standard. Concurrently, he argues that the doctrine of laches applies to his case. The Tribunal will deal with the latter argument first. As correctly pointed out by the Respondent in his answer before the JAB, the equitable doctrine of laches applies when a party claiming an injury fails to initiate a legal proceeding

within a reasonable period of time. If the party waits too long to assert his or her rights, the claim will be considered time barred. The Applicant did not invoke this doctrine correctly. Therefore, the Tribunal concludes that "laches" cannot be raised against the CARC to compel reclassification of the Applicant's post to the P-5 level.

VII. With respect to the claim that the CARC did not properly evaluate the Applicant's work record, the Tribunal does not find that this was the case. Having reviewed all the material before the Tribunal, it appears that the CARC did take into account the Applicant's arguments. The Respondent's acceptance of the CARC's recommendation does not constitute a violation of the Applicant's rights. The Tribunal finds that the conclusions of the CARC were reached after hearing both parties and were presented in a reasoned report.

VIII. The Tribunal notes the Applicant's excellent work record. Nonetheless, it has been constantly held by the Tribunal that a staff member has no right to reclassification of his or her post, but only a right to request the reclassification of such post. Qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectation (Judgement No. 312, Roberts (1983)). The Tribunal has long recognized the wide discretion of the Secretary-General in classification matters (Judgements No. 396, Waldegrave (1987) and No. 597, Colayco (1993)).

IX. It is for the person alleging improper motivation or arbitrariness to produce convincing evidence in support of these allegations. The Tribunal cannot find any proof to support the Applicant's allegations that he was not given a fair hearing. The

Tribunal accepts the Respondent's contention that the CARC is entitled, on an ex parte basis, to obtain technical advice not related to the substantial issues before it. Lastly, the Tribunal is unable to find any evidence of prejudice regarding the 14 November 1989 memorandum by the ASG/OHRM. The memorandum states the ASG/OHRM's conclusions after he reviewed the Applicant's case. The fact that he believed that the Applicant's case was without merit and transmitted his opinion to the Chairman of the APB cannot be viewed as improper influence and does not constitute prejudice. With respect to these allegations, the Tribunal can only conclude that the Applicant has not sustained his burden of proving arbitrary action or abuse of power on the part of the Respondent.

X. For the foregoing reasons, the Tribunal decides that:

1. The Respondent shall pay US$10,000 to the Applicant for the moral injury he sustained due to the unreasonable delay in dealing with his case.

2. All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

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Administrative Tribunal

Distr.
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AT/DEC/785
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 785

Case No. 862: WHITE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Mikuin Leliel Balanda; Ms. Deborah Taylor Ashford;

Whereas, on 19 May 1995, Thomas C. White, a staff member of the United Nations, filed an application requesting the Tribunal:

"A. To find that the suspension of the Applicant, for actions taken two years previously in a different duty station, and the maintenance of the suspension for a period of six months for no good reason, constituted an abuse of the Respondent's disciplinary authority, prejudiced the Applicant's right to a fair hearing, and caused irreparable damage to his career and his good name and reputation;

B. To find that the Applicant was denied full due process in that a highly damaging statement submitted belatedly to the Joint Disciplinary Committee [JDC] was not made available to the Applicant or his counsel before the JDC report was forwarded to the Under-Secretary-General, DAM [Department of Administration and Management];

C. To find that the Secretary-General's decision, dated 16 February 1995, to impose upon the Applicant a disciplinary sanction far in excess of that recommended by the Joint Disciplinary Committee, was inconsistent with his basic conclusion that the Applicant 'failed to exercise proper judgement', an offence usually meriting a reprimand at most, and was tainted by prejudice;

D. To find that, by excluding the element of intent, and by failing to take fully into account the surrounding circumstances, the Secretary-General unfairly characterizes as serious misconduct the Applicant's good faith effort to provide accommodation for staff in a situation of emergency; and

E. To find that the actions of the Respondent have damaged the Applicant's good name, reputation and career, and to order appropriate compensation therefor."

Whereas the Respondent filed his answer on 18 December 1995;

Whereas, on 29 April 1996, the Applicant filed written observations in which he requested the Tribunal:

"a. To order a rescission of the Secretary-General's decision conveyed to the Applicant in [the Under-Secretary-General for Administration and Management]'s letter of 16 February 1995 and order the Applicant's reinstatement to a position of trust and responsibility at the P-5 level;

b. To order that no impediment be put in the way for him to be considered eligible for promotion to the D-1 level, and to a post commensurate with his experience and ability;

c. To order compensation to the Applicant for moral and material injury to him as a result of the unjustified suspension and imposition of the disciplinary measure of demotion; that such compensation should include an amount equivalent to SPA [Special Post Allowance] to D-1 for his duty as Chief Technical Services of UNOSOM [United Nations Operation in Somalia] II Somalia, and such as would compensate for the difference in remuneration in other emoluments between what was actually received by him and what he would have been entitled to in the absence of the disciplinary measure;

d. To order that suitable measures be taken to restore the Applicant's reputation and good name and to remove the misimpression created by the unjustified disciplinary action;

e. Alternatively, and should the Secretary-General not accede to the Tribunal's decision to rescind the disciplinary measure, the Applicant prays that adequate compensation be ordered in his favour, bearing in mind the serious moral and material injury done to him and the damage to his reputation and integrity."

Whereas, on 21 October 1996, the President ruled that no oral proceedings would be held in the case;

Whereas, on 28 October 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which he did, on 1 November 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 14 July 1985, on a two-year fixed-term appointment at the P-4 level, as Chief, Logistics and Support Unit, Peace Forces Administrative Section, which later became the Field Operation Division. On 14 July 1987, his appointment was extended for two years. With effect from 3 January 1989, he was temporarily reassigned from Headquarters to the United Nations Angola Verification Mission II (UNAVEM II), Luanda, as Chief Administrative Officer, with a special post allowance to the P-5 level. On 14 July 1989, his fixed-term appointment was extended for three years, after which he received shorter extensions of varying duration. The Applicant was promoted to the P-5, step I level, with effect from 1 August 1990. On 31 January 1991, he was reassigned from UNAVEM to the United Nations Interim Force in Lebanon as Chief Procurement Officer. From 20 June 1991 to 7 September 1993, he served as Chief Administrative Officer, UNAVEM, with a special post allowance to the D-1 level. With effect from 8 September 1993, he was reassigned temporarily to UNOSOM, Somalia as Chief, Technical Services. The Applicant was suspended with pay from 20 April 1994 to 18 October 1994, when he was reappointed as Senior Administrative Officer, at the P-5, step VI level, in the Department of Peace-Keeping Operations.

During their initial deployment period from August 1991 to April 1992, there was a shortage of adequate housing for UNAVEM's staff, consisting of more than 250 international military, police, medical staff and other civilian personnel in Luanda. As described in writing by several staff members, the housing situation in Luanda

at that time was "desperate" due to the absence of a housing infrastructure and the consequent lack of proper accommodation. The investigations carried out by the Joint Appeals Board (JAB) showed that, due to the short supply of, and the resulting "competition" among all international organizations for, accommodation, various landlords imposed restrictions which potential renters had little option but to accept if they wished to provide their staff with adequate housing.

The Applicant reported for duty as Chief Administrative Officer on 20 June 1991. For about six months, until the arrival of the head of UNAVEM II, he was the highest ranking civilian. During that period, he reported to the Military Commander of the Mission.

Subsequent to a 23 June 1993 meeting of the Assistant Secretary-General for Inspections and Investigations, the Executive Director of UNAVEM and the Legal Advisor of UNAVEM, the Under-Secretary-General for Administration and Management requested two senior staff members of the Organization to visit UNAVEM II's Headquarters in Luanda, to establish the facts relating to a number of allegations made against the Applicant.

On 9 December 1993, the fact-finding mission submitted its report. Its findings in relation to housing for staff of UNAVEM II read as follows:

> "I. Discrimination in housing of UNAVEM staff
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> 6. The documentation assembled in the course of the investigation on this subject is attached as Annex I to this report. Based on that documentation and the personal interviews that were conducted, our findings are as follows:
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> a) UNAVEM II rented up to 5 apartments at the Czech Embassy in Luanda during the period January - September 1992;
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> b) The lease agreements were signed on behalf of UNAVEM II by [the Applicant], [who was the] Chief Administrative Officer [CAO]; monthly rent was set at $1,000.00 per apartment and the lease could be terminated by either party upon 30 days written notice;

c) The lease terms were negotiated by the Czech Ambassador and [the Applicant]; they included the unwritten, but clearly understood condition that black staff members of UNAVEM II would not be housed there;

d) The prohibition did not extend to Filipino, Chinese and other light-skinned Asian staff, but covered dark-skinned Asians (including specifically the current Camp Manager, [...], who is a dark-skinned Sri Lankan);

e) The exclusion policy was known to and enforced by UNAVEM staff responsible for arranging housing assignments, namely Ms. [X], Camp Manager Mr. [...] and later Camp Manager Mr. [...];

f) [The Applicant] admitted that he had agreed to the restriction at the insistence of the Czech Ambassador, at a time when there was an acute housing shortage for UNAVEM staff;

g) Various people interviewed gave the following possible explanations for the rationale that might have been behind the Czech insistence on housing discrimination directed against black UNAVEM II staff members:

i) ... (former UNAVEM Legal Officer): the property, owned by the Angolan Government, was leased to the Czech Embassy with a prohibition against sub-letting, and the presence of black tenants would be clear evidence of the violation of that prohibition;

ii) ... (Chief Political Officer): the Angolan Government did not want blacks to be housed there, both for security reasons and to prevent unauthorized contacts between Angolans and foreign embassies;

iii) [The Applicant] (CAO): the Angolan Government, which owned the property, did not want any Angolans to move in because it would be practically impossible to get them to move out later;

iv) ... (Chief General Service Officer): staff of the Czech Embassy would have been 'harassed' by the Angolan authorities if blacks were permitted to live there.

h) Although the policy was quite well known within UNAVEM, no one raised any formal objection or complaint with the Executive Director or Chief Administrative Officer of UNAVEM II until a general staff meeting that was convened on 17 July 1992, on the occasion of the visit to UNAVEM of [the Director of the Field Operations Division]; the issue was raised at that time by [the Senior Political Officer];

i) At the 17 July 1992 staff meeting, [the Director, FOD] requested [the Applicant] to look into the matter;

j) Shortly after 17 July 1992, at a regularly scheduled meeting among the Special Representative of the Secretary-General [...], Executive Director [...] and [the Applicant], [the Applicant] was told to terminate the lease arrangement with the Czech Embassy;

k) Formal notice of the lease termination was sent by [the Applicant] to the Czech Embassy on 17 August 1992;

l) By a memorandum of 24 August 1992 [the Applicant] advised UNAVEM senior staff that UNAVEM would not be renting apartments at the Czech Embassy as of 17 September 1992; by that date, other accommodations were found for the staff who were then housed at the Czech Embassy."

On 18 April 1994, the Officer-in-Charge of the Staff Administration and Training Division, Office of Human Resources Management (OHRM), transmitted a copy of the Mission's report to the Applicant and charged him with misconduct, by "making arrangements for segregated housing for UNAVEM II staff members". In this letter, the Applicant was informed that "the Secretary-General has decided, in the interest of the Organization, to suspend you from duty with full pay under staff rule 110.2, effective immediately ... This suspension will have a probable duration of three months". The Applicant was also advised that he was to remain in Mogadishu.

On 6 June 1994, the Applicant submitted a written statement in response to the charge. He pointed out that his former direct supervisor had given him a strong personal recommendation. In a letter dated 26 May 1994, to the Under-Secretary-General for Administration and Management, the Applicant's former direct

supervisor underlined that she "never detected any act or expression that could remotely be interpreted as racial discrimination".

On 9 September 1994, the Assistant Secretary-General, OHRM, submitted the case to the Joint Disciplinary Committee (JDC) at Headquarters, asking "what disciplinary measure should be taken against him [the Applicant] in connection with the charge that he, as Chief Administrative Officer in UNAVEM II, entered into an agreement to house UNAVEM staff under a segregated housing policy for UNAVEM II staff".

On 18 October 1994, the Applicant was informed by a memorandum from the Assistant Secretary-General, OHRM, that "I have decided to lift your suspension from duty with immediate effect."

The JDC adopted its report on 18 January 1995. Its conclusions and recommendation read as follows:

> "24. The Panel read carefully the records before it and examined the testimonies given at the hearings. The Panel concluded that despite the fact that the staff member had intended to alleviate problems with staff housing by accepting the unwritten condition in the lease agreement with the Czech Embassy, namely that Angolan nationals and, by extension black/dark-skinned staff members of UNAVEM II, would not be housed in the Embassy accommodation, he had acted in a manner clearly incompatible with the standard of conduct required of a United Nations staff member.
>
> 25. The Panel recognized that the housing situation in Luanda was desperate and that the staff member made every effort to relieve it to the maximum extent possible. However, in his desire to achieve some success, he exercised poor judgement. He was oblivious to the need to respect the fundamental principle of the United Nations Charter, respect of human rights, which cannot be sacrificed under any circumstances.
>
> 26. The Panel concluded that there was no improper motive underlying the staff member's decision to enter into an agreement to house UNAVEM II staff under a segregated housing policy. The Panel considered that the staff member was blind to the implications of his decision.

27. The Panel noted that it was not only the staff member who was blind to the above-mentioned consequences. This was derived from the evidence before it, and from the findings of the Fact Finding Mission, namely that '... the policy was quite well known within UNAVEM'.

28. The Panel was extremely disturbed to find that, during seven months, none of the staff serving in Luanda complained about the housing restriction to the staff member, or to his supervisors, even though the staff member renewed this agreement with the Czech Embassy, after his supervisors were already in Luanda. The Panel noted that if [the Director, FOD] had not come to Luanda, the issue might not have been publicly aired.

29. The Panel concurred with [the Assistant Secretary-General for Inspections and Investigations]'s words in his memorandum to [the Under-Secretary-General for Administration and Management] that '... the conduct of all those senior officials who knew about this arrangement and failed to take corrective action [constituted] failure in their responsibility. This conduct may also merit appropriate reprimand in view of the seriousness of the matter at hand. I find it disturbing that although this policy was widely known at UNAVEM, including by the head of the Field Service Staff Association, no formal complaints were voiced until [the Director, FOD]'s visit to UNAVEM in July 1992'.

30. The Panel did not find that the staff member was motivated by racial discrimination in the implementation of the restriction by the Czech Embassy. The Panel noted statements by the witnesses that the staff member had personally no racist attitudes.

31. The Panel noted the staff member's overall excellent performance based on the PER's submitted, and the testimonies heard.

32. The Panel also took into account that the staff member was working under very difficult conditions in a country at war.

33. The Panel concluded that the staff member was clearly at fault for his inability to see the seriousness of his decision by entering into a lease agreement which included an unwritten restrictive clause segregating UNAVEM staff, but, for the reasons indicated above, there was no intent to act in a racist manner. In this context, the Panel noted the

staff member's statement that 'if he were to go back in time he would not make the same decision'.

Recommendation:

34. The Panel is concerned with the lack of sensitivity which the staff member displayed when he made the decision to enter into a lease agreement which included an unwritten restrictive clause with a segregating housing policy for UNAVEM II staff.

35. The Panel is disturbed by the staff member's inability to see the implications of his actions, and to understand the responsibility he had at his level to uphold and protect one of the basic principles of the United Nations Charter. The Panel considers that such behaviour constitutes a misconduct under the Staff Rules.

36. The Panel unanimously agreed that a written censure of the Secretary-General is an appropriate sanction."

On 16 February 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and advised him as follows:

"The Secretary-General has examined your case in the light of the Committee's report. He agrees with the Committee's conclusion that you were clearly at fault for your inability to see the seriousness of your decision by entering into and implementing a lease agreement which included an unwritten restrictive clause segregating UNAVEM II staff. The Secretary-General has concluded that such decision and implementation constituted misconduct.

The Secretary-General has given careful consideration to the mitigating factors including the very difficult conditions under which you were working in a country at war; and the apparent absence of objection from other UNAVEM II staff. However, these factors cannot excuse your actions as Chief Administrative Officer. The Secretary-General has concluded that you failed to exercise proper judgement as the Chief Administrative Officer with a responsibility, inter alia, to uphold and protect one of the basic principles of the United Nations Charter. On the Committee's conclusion that there was no intent to act in a racist manner, the Secretary-General wishes to reiterate that, where a staff member's conduct is in breach of an applicable regulation,

rule or administrative issuance, or falls below the standard expected of an international civil servant, such conduct would be considered as culpable, and the absence of an accompanying wrongful intent would not constitute an excuse. For the above reasons, the Secretary-General cannot accept the sanction recommended by the Committee which he finds too lenient for such serious misconduct.

Pursuant to the Secretary-General's discretionary authority to impose an appropriate disciplinary measure, the Secretary-General has decided to demote you, under staff rule 110.3(a)(vi), to the P-4 level, step VI, at which level and step you will remain for one year.

In accordance with staff rule 110.4(d), any appeal you might wish to file in respect of the above decision should be submitted directly to the Administrative Tribunal."

By a letter dated 2 March 1995, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"... as a matter of clarification, this is to confirm that at the end of the stated one year period of demotion, you will become eligible anew to the regular incremental step increase within grade. In accordance with your performance record and Staff Rules, you may then also become eligible for consideration for promotion. For the record and on the basis of the effective date of your most recent step increase, your demotion is effective 16 February 1995 at the P-4 step VII level."

On 19 May 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Imposition of a disciplinary measure was improper because it occurred two years after the event.

2. The Applicant's suspension with pay for an extended period of investigation was prejudicial.

3. The JDC denied the Applicant due process in that a prejudicial statement was not sent to him for comments prior to the submission of the JDC's report to the Secretary-General.

4. The Secretary-General's decision to impose a disciplinary sanction on the Applicant violated his rights because it was far in excess of the sanction recommended by the JDC and because it failed to take into account both the lack of the Applicant's intent to engage in racial discrimination and the difficult housing situation in Angola.

Whereas the Respondent's principal contentions are:

1. The Applicant's suspension, pending investigation of a number of serious charges, was proper and was lifted after it became apparent that only one charge would be submitted to the JDC and that this charge would not be quickly finalized.

2. The charge against the Applicant was heard by the JDC, which accorded the Applicant due process.

3. The Respondent is not bound to accept the recommendations of the JDC.

The Tribunal, having deliberated from 28 October to 21 November 1996, now pronounces the following judgement:

I. The significant facts in this case are not in dispute. While serving as Chief Administrative Officer of UNAVEM II in Angola, the Applicant, under pressure to find adequate housing for UN personnel, concluded a lease agreement with the Czech Embassy in Angola, which included the unwritten condition that Angolan nationals, or those who could be mistaken for them, could not be accommodated in, or even admitted to, the Czech property. Following a preliminary investigation, charges were brought against the Applicant for having made this arrangement, as well as several other alleged administrative irregularities. The Applicant was suspended with pay, and the case was referred to the Joint Disciplinary Committee (JDC), leading ultimately to the imposition of disciplinary

sanctions by the Secretary-General in connection with the housing arrangement with the Czech Embassy. The other charges were dropped.

II. It is clear that the unwritten condition of the housing arrangement was intended to preclude the use of the leased embassy apartments by black or dark-skinned people, including UN staff members. The Applicant denies any intent to create segregated housing and stresses the administrative necessity of the arrangement, due to the shortage of adequate housing in Luanda. The concern of the Czech Embassy appears to have been either an Angolan Government requirement that no Angolans occupy the apartments, or the possibility that the sub-leasing arrangements might be more readily discoverable, if dark-skinned occupants were allowed as tenants or otherwise admitted to the premises. The Applicant notes that other leases were restricted to certain other people, based on their nationality.

III. The Tribunal accepts the good faith of the Applicant, as did the JDC and the Administration. The Tribunal also accepts the finding of the JDC, endorsed by the Administration, that the Applicant exercised poor judgement in accepting a condition on behalf of the United Nations that housing and facilities would be used for white and light-skinned staff members only. Irrespective of any explanation, such a condition is abhorrent to the principles set forth in the Charter, and the Tribunal agrees with the JDC, that such principles "cannot be sacrificed under any circumstances".

IV. The Applicant justifies his action, noting that the discriminatory aspect of the housing arrangement was not initiated by him, was not the subject of complaints at the time, and did not endanger life or health. He does not recognize that, in accepting a housing condition based on skin color, he condoned racial discrimination as being acceptable under the circumstances and made

the United Nations an accomplice to a fundamental violation of human rights, particularly hurtful to the black and dark-skinned staff members serving UNAVEM, as evidenced by several statements in the record.

V. In these circumstances, the Tribunal finds that the disciplinary measure imposed by the Secretary-General on the Applicant was both justified and a reasonable exercise of discretion. The JDC's recommendations are advisory in nature. The fact that the Secretary-General's disciplinary measure was more severe than the reprimand recommended by the JDC is not inconsistent with the proper exercise of his discretion. There has been no evidence that the exercise of this discretion was tainted by any improper motives.

VI. The Applicant asserts that he was denied due process by the JDC because a statement made by the Executive Director of UNAVEM, in response to questions put by the JDC, was not made available to him or his counsel for comment before the JDC concluded its report. The Secretary of the JDC contends that the Applicant was personally handed a copy of this statement. In the light of the statements made, it seems possible that the Applicant received this statement but that it was transmitted to his counsel belatedly. The Tribunal has examined the comments of the Applicant on the statement and finds that, even if they are all accepted as clarifications of the facts of the case, the underlying issue remains the same. The Applicant does not contest that he acquiesced to a housing arrangement with an unwritten condition excluding staff members on the basis of their skin color. This is the essential fact on the basis of which the JDC made its findings, having taken into account the explanations offered by the Applicant. The Tribunal finds that the proceedings before the JDC were not conducted in a manner inconsistent with the rights of the Applicant.

VII. The Applicant contends that his suspension was unjustified in terms of the rules and regulations and constituted a de facto disciplinary measure. ST/AI/371, which governs the imposition of disciplinary measures, sets forth the conditions for suspension. The Applicant cites a provision which states that "as a general principle, suspension may be contemplated if the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed ..." The Tribunal notes that the cited provision follows a more general one, which states, "If the conduct appears to be of such a nature and of such gravity that suspension may be warranted, the head of office or responsible official shall make a recommendation to that effect, giving reasons". Several charges of administrative irregularities were made against the Applicant at the time of his suspension. These charges address a number of different decisions which had been made by the Applicant and which suggested the possibility of poor judgement and even financial impropriety. Shortly thereafter, the charges were narrowed to the single action taken by the Applicant in connection with the leased apartments. The suspension with pay was ended. Although the Applicant was suspended, there is no evidence to suggest that the suspension was imposed as a penalty. The Tribunal finds that the decision to impose suspension was within the discretionary authority of the Secretary-General and was correctly taken.

VIII. The Applicant further contends that his permanent demotion was a far more serious punishment than was set forth in the decision from the Under-Secretary-General, dated 16 February 1995. By that letter, the Applicant was informed that "the Secretary-General has decided to demote you, under staff rule 110.3 (a) (vi), to the P-4 level, step VI, at which level and step you will remain for one year". By a letter dated 2 March 1995, the Under-Secretary-General informed the Applicant that "as a matter of clarification, this is

to confirm that, at the end of the stated one-year period of demotion, you will become eligible anew to the regular incremental step increase within grade" and "may then also become eligible for consideration for promotion." The Tribunal finds that this "clarification" constitutes an additional penalty that was not stated in the letter of 16 February 1995. The clear indication in that letter is that the penalty is a twelve-month demotion, after which period the Applicant would revert to the grade and step in which he found himself at the time of demotion. Thus, the Tribunal finds that the Applicant, as of 17 February 1996, should have reverted to the P-5, step VII level, eligible for step increases after twelve months at that level.

IX. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the difference between the amount he received on and after 17 February 1996 and what he should have received at the P-5, step VII level on that date and thereafter.

X. The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
President

Mikuin Leliel BALANDA
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/786
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 786

Case No. 865: DOMATO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, at the request of Angelina Domato, a former staff member of the United Nations Population Fund (hereinafter referred to as UNFPA), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 July 1995;

Whereas, on 15 June 1995, the Applicant filed an application requesting the Tribunal to order the Respondent to provide certain information and documentation and, further:

(a) To rescind the decision of the Secretary-General of 3 February 1995, based on the recommendation of the Joint Appeals Board (JAB) of 26 January 1995, not to extend the Applicant's fixed-term appointment beyond 14 February 1995;

(b) To order that UNFPA reinstate the Applicant in the Service of the Organization retroactive from 14 February 1995;

(c) To order that the Secretary-General pay the Applicant her salary and appropriate allowances retroactive [to] 14 February 1995 as well as appropriate contributions on her behalf to the United Nations Joint Staff Pension Fund retroactive [to] 14 February 1995;

(d) To award the Applicant appropriate and adequate compensation for the material and moral injuries suffered by her as a direct consequence of the arbitrary and prejudicial decision taken by UNFPA not to extend her contract beyond 14 October 1994."

Whereas the Respondent filed his answer on 21 November 1995;

Whereas the Applicant filed written observations on 27 March 1996;

Whereas the facts in the case are as follows:

Beginning in 1985, the Applicant worked as a consultant with UNFPA and UNICEF in Burkina Faso and in Afghanistan, respectively, and in the UN Population Division. The Applicant entered the service of UNFPA on 13 August 1990, as an Evaluation Officer at the P-3 level, on a six-month fixed-term appointment. On 15 October 1990, her appointment was extended for approximately two years, and renewed twice thereafter, for additional periods of one year each. It was further extended to 14 November 1994 and, subsequently, through 14 February 1995. The Applicant separated from service on 14 February 1995.

The Applicant received three annual performance appraisal reviews (PARs), for the years 1991, 1992 and 1993. The Applicant's PAR for 1991 indicated a rating from her supervisor of (3) ("meets the expectations of the performance plan"), which was downgraded by the Management Review Group (MRG) to a rating of (4) ("meets some of the expectations of the performance plan but performance needs improvement"). As regards the Applicant's performance in 1992, her supervisor recommended, and the MRG endorsed, a rating of (3). For her 1993 performance, her supervisor recommended, and the MRG endorsed, a rating of (4). In a memorandum dated 14 February 1994, the Applicant submitted to the Chief, Personnel Branch, Division for

Applicant was suspended without pay for failing to resume his duties since 27 January 1973. His PER for that year stated that he maintained "only a minimum standard of efficiency" and his annual increment was deferred for six months. His PERs for 1974 and 1975 showed a "good standard of efficiency". His performance for the years 1976 through 1979 was rated "satisfactory". In 1980, he was rated "an unsatisfactory staff member". By a letter dated 15 May 1980, the Applicant was given a "final warning" by the Director of UNRWA Operations (DUO), Gaza, and was placed on probation for one year. By a letter from the Acting Field Administrative and Finance Officer, UNRWA, Gaza, dated 2 January 1981, the Applicant was informed that his services would be terminated on medical grounds pursuant to Area staff rule 109.7. The Applicant appealed this decision and, on 19 June 1981, the Joint Appeals Board (JAB) recommended that the Applicant be reinstated in another suitable post. The Applicant was reinstated with effect from 3 January 1981.

By a letter dated 8 August 1982, from the DUO, Gaza, the Applicant was informed that, effective 7 September 1982, his appointment was to be terminated in the interest of the Agency, due to his unsatisfactory performance.

The Applicant submitted an appeal against this decision to the JAB on 18 September 1982. In its report dated 19 November 1982, the JAB upheld his termination. It recommended, on humanitarian grounds and in view of the Applicant's long service with the Agency, that he be given priority for reinstatement in a non-teaching post. Effective 1 March 1985, the Applicant was re-employed by the Agency in the Eligibility and Registration Division as a Clerk "D".

On 3 January 1994, a Senior Clerk was transferred to the post of Acting Camp Eligibility and Registration Officer (A/CERO) in Deir-el-Balah, the Applicant's place of work. By letter of 23 January 1994, the Applicant complained to the Field Administrative Officer that this transfer had deprived the Applicant of the post of A/CERO and the associated "privileges". By letter of

27 January 1994, the Field Administrative Officer replied that the Applicant had no right to be appointed as A/CERO and the appointment of the Senior Clerk to the post would, in any event, have no bearing on the Applicant's prospect of being promoted to the position of CERO. Further correspondence on this subject followed.

A periodic report on the Applicant was completed on 12 February 1994; the Applicant's immediate supervisor, the CERO, gave the Applicant low ratings throughout. The CERO also noted that: "He is not ready to hear any discussion to improve his situation from any supervisor". The Applicant's intermediate reporting officer, the Field Eligibility, Registration, Distribution and Accommodation Officer, rated the Applicant as "on the whole, an unsatisfactory staff member", and his overall supervisor, the Acting Deputy Chief, Field Relief and Social Services Programme, noted in the report that the Applicant's supervisor (the CERO) had advised that the Applicant would not do any job requested by the CERO.

On 22 February 1994, the Acting Chief of the Field Relief and Social Services Programme sent a memorandum to the Field Administrative Officer concerning the Applicant's refusal to cooperate with the CERO and to carry out work assigned by him. On 2 March 1994, the Field Administrative Officer wrote to the Applicant censuring him and suspending him without pay for three days due to the latter's refusal to follow instructions from his superiors. The letter warned the Applicant that, should his official conduct again be the subject of a complaint, the Agency would be obliged to take action, which might include termination.

On 5 March 1994, the Field Administrative Officer again wrote to the Applicant concerning his performance. As a result of the deficiencies and inadequacies identified in the Applicant's periodic report, the Agency decided to defer consideration of the Applicant's annual increment for three months.

In a reply dated the same day, to the Field Administrative Officer, the Applicant objected to his suspension without pay

(notified to him by the letter of 2 March 1994) and restated his earlier objection to the appointment of the Senior Clerk as CERO. He stated: "I cannot cooperate with [him]. He is nothing in comparison with me. He is the wrong person in the wrong place. He has not any skills or competence."

On 7 March 1994, the Field Eligibility, Registration, Distribution and Accommodation Officer sent an action slip to the Acting Deputy Chief of the Field Relief and Social Services Programme in which he advised him of the Applicant's continued failure to cooperate with the CERO and of his insistence on performing work during his suspension.

On 8 March 1994, the Field Administrative Officer addressed a "Final Warning" letter to the Applicant. He reiterated that the Agency would not "tolerate gross insubordination", such as refusing to cooperate with his superiors, and noted that the Applicant's performance was "unsatisfactory in almost every respect". He warned the Applicant that if his performance did not improve markedly, the Agency would terminate his services.

On 3 April 1994, the Acting Chief, Field Relief and Social Services Programme, notified the Field Administrative Officer that the Applicant was refusing to cooperate with his supervisor (the CERO). He attached a memorandum from the CERO that listed a number of instances of alleged non-cooperation. On 4 April 1994, the Acting Deputy Chief, Field Relief and Social Services Programme, wrote to the Field Administrative Officer stating that the CERO had also reported that the Applicant refused to obey the CERO's instructions and to cooperate with him.

The Applicant's periodic report dated 31 May 1994 was prepared for the purpose of deciding whether the Applicant should receive his deferred salary increment. The CERO gave the Applicant low ratings in six categories and satisfactory ratings in the remaining two. He noted, "I discussed [the Applicant's] performance

of his duties and cooperation ... but he refused to cooperate with me, and insists [on] work[ing] according to his wishes".

The Applicant's intermediate reporting officer, the Acting Field Eligibility and Registration Officer, rated the Applicant as "on the whole, an unsatisfactory staff member". He noted, "[t]he employee doesn't cooperate with his supervisor and works according to his wishes and not his job description". The comments of the Applicant's overall supervisor, the Field Eligibility, Registration, Distribution and Accommodation Officer, were similar. The Officer-in-Charge of the Relief and Social Services Department also noted that the Applicant's performance was unsatisfactory.

On 1 June 1994, the DUO, Gaza, wrote to the Applicant and advised him that, as a result of the most recent periodic report, the Applicant would not receive his deferred annual increment. Further, he noted that, since the final warning contained in the Field Administrative Officer's letter of 8 March 1994, the Applicant had "made no serious attempt to improve [his] performance. Therefore, I have no choice but to terminate your services in the interest of the Agency under Area staff regulation 9.1, effective 4 June 1994."

On 6 June 1994, the Applicant requested the DUO, Gaza, to review the decision to terminate his services. On 13 June 1994, the DUO, Gaza, confirmed the decision.

On 18 July 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 3 April 1995. Its evaluation, judgement and recommendation read, in part, as follows:

> "(a) ... the Board noted that:
>
> (1) The Appellant had had a turbulent career as reported and documented during his service with the Agency in different positions (teaching and clerical).
>
> (2) The Appellant has been the subject of adverse reporting and complaint by his supervisors.

(3) Several disciplinary measures including written censure and suspension without pay were taken against the Appellant as a result of his insubordination. He was given a letter of final warning and his annual increment was deferred in the hope that he would show improvement in his performance.

(b) The Board could not establish that the decision to terminate the Appellant's service was triggered by any extraneous factors, or was motivated by bias or prejudice against the Appellant, particularly in the absence of any satisfactory reporting on his performance.

(c) In this context, the Board is of the opinion that the Administration has acted within the framework of standing rules and regulations.

III. Recommendation

25. In view of the foregoing, and without prejudice to any further oral or written submission to any party the Appellant may deem pertinent, the Board unanimously makes its recommendation to uphold the Administration's decision to terminate the Appellant's service in the interest of the Agency under Area staff rule 109.1; and that the case be dismissed."

On 3 May 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"I enclose herewith a copy of the report on the Area Staff Joint Appeals Board of 3 April 1995, regarding your appeal. You will note that the Board has concluded that the Administration's decision to terminate your appointment in the interest of the Agency, pursuant to Area staff regulation 9.1, was lawful and proper. The Board, therefore, recommended that the Administration's decision be upheld and that your appeal be dismissed. I accept these conclusions and recommendations; your appeal is, therefore, dismissed."

On 11 September 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Respondent's decision to separate him from service was arbitrary and motivated by prejudice.

Whereas the Respondent's principal contentions are:

1. The Area Staff Rules and Regulations require that the decision to terminate the Applicant's services must stand unless it was procedurally defective or improperly motivated.

2. The facts show that the Applicant's performance was poor and that the decision to terminate his services was therefore proper.

The Tribunal, having deliberated from 24 October to 21 November 1996, now pronounces the following judgement:

I. The Tribunal accepts the Applicant's plea that all the events which took place prior to his appointment, on 1 March 1985, as a Clerk in the Eligibility and Registration Division, should be considered as irrelevant in judging the Applicant's present complaint. It follows, of course, that the Applicant's own allegation of prejudice and revenge made by him against various officials of UNWRA before March 1985 should also be excluded from the scope of the present judgement.

II. The principal feature of this case is the appointment, on 3 January 1994, of a grade 8 clerk (senior to the Applicant) as Acting Camp Eligibility and Registration Officer (A/CERO) at the Deir-el-Balah Distribution Office when the incumbent became sick at the time of his retirement. The Applicant had expected to be appointed to this post, and he very much resented that someone else had been made A/CERO. The Applicant considered that the person selected had been guilty of wrong-doing, that he was much less

qualified than the Applicant and that his appointment was brought about by manipulation by the Director, Field Relief and Social Services Programme (D/FRSSP). The Applicant began a sustained protest against this appointment which he felt was not only unjust and unfair but was intended to deprive him of what he considered to be his right and was meant to "close and divert the vacancy to another place in favour of another person". He specifically accused the D/FRSSP of having an arbitrary attitude and stated that the appointment of the person selected would deprive the Applicant of his right to be considered for the post. The Applicant's argument was based on his feeling that his temporary appointment as CERO would have enabled him to claim the post later, inasmuch as such temporary appointments often place the official concerned in a favourable position in relation to other candidates for the post.

III. The Applicant's first protest was answered by the Field Administrative Officer, who found "nothing wrong" in the D/FRSSP's action. The appointment of an A/CERO would not deprive the Applicant of being considered for the post.

This reply was met with a barrage of accusations by the Applicant, not only against the D/FRSSP but also against UNWRA, which the Applicant considered to be a totalitarian organization, that was unfair especially to junior officers and manipulated by interested persons. These protests emanated, apparently, from his chagrin and resentment; however, they were virtually ignored. Meanwhile, it was found that the Applicant's work was not at all satisfactory and that he was blatantly refusing to follow any instruction from the A/CERO, who was his supervising officer, but whom he considered to be unworthy of the job and incompetent compared to himself. These developments led first to the Applicant's suspension (which he refused to accept), then to the withholding of the increments which would normally be due to him and finally to his termination. During these events, he denied all

accusations, and stressed his zeal for probity and integrity, as well as his competence and fairness. Meanwhile, the Respondent issued, on 2 March 1994, a written censure warning the Applicant that "UNWRA is not willing to accept gross insubordination as displayed through your behaviour. The fact that you were not appointed as A/CERO does not give you the right to refuse to cooperate with your supervisor." His work continued to be "less than satisfactory" and he was told that "[f]ailure to secure a satisfactory periodic report within twelve months may result in termination of your services with the Agency for unsatisfactory performance."

IV. The Applicant still insisted that his work was above reproach and he became increasingly obstreperous. In a letter dated 5 March 1994, he said, inter alia, "You intend to suspend me wrongfully" and much more in the same vein. However, he had been supplied with details of his failure to cooperate with the A/CERO and of the many other lapses found in his work and attitude. The Applicant did not agree with any of these assessments and refused to sign the periodic reports which contained unfavourable comments. In a letter dated 13 June 1994, marked "Private and Official", the Director of UNWRA Operations (DUO), Gaza, dealt with the subject entitled "Review of Termination of Service" of the Applicant and said "You claim prejudice because you criticised an 'unwise and harmful measure'. However, you were terminated because of your actions and not because of your words". He pointed out various incorrect statements which the Applicant had made and concluded "Your letter contains no new arguments which lead me to overturning my decision to terminate your services in the interest of the Agency. That decision is hereby confirmed."

V. Immediately, a significant change became noticeable. In the Applicant's letter of 18 June 1994, addressed to the DUO, Gaza, he

Rebuttal Panel and concluded that the Panel's report did not justify a change in the rating. As the Applicant herself admits in her arguments, the MRG had the "legal power" to reject the recommendation of the Rebuttal Panel. She, therefore, had the burden of proving that extraneous factors or prejudice existed which resulted in the rejection. The differences of opinion between the MRG and the Rebuttal Panel concerning the Applicant's performance do not indicate prejudice or suggest the existence of extraneous factors. The Tribunal finds that the Applicant has not offered evidence to the contrary. The Tribunal concludes that the MRG's review of the Applicant's performance and its decision to maintain the ratings were not arbitrary or based on any other improper motive.

VIII. In addition, the Applicant has not met her burden of proving that there was a lack of due process or prejudice on the part of the Respondent when he refused to renew her fixed-term appointment. It is not the role of the Tribunal to review the performance evaluations of staff members. It cannot substitute its judgement for that of the Respondent. The Tribunal can only intervene in these decisions if it is shown that the Staff Rules and Regulations, including UNFPA's Guidelines for PAR, have not been respected or that prejudice or extraneous factors have tainted the Respondent's decision. The Applicant has failed to meet the burden of proving that such factors existed.

IX. The JAB had the opportunity to analyze the Applicant's performance for the years 1991, 1992 and 1993. It found that her performance had been properly reviewed under the PAR system by her supervisors and the MRG. The Tribunal can only concur with the JAB's findings.

X. Based on the foregoing, the Tribunal rejects the Applicant's pleas in their entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/787
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 787

Case No. 868: ABRAMOV

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 11 June and 1 November 1994 and 28 February 1995, Evgueni Abramov, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the President of the Tribunal, with the agreement of the Respondent, extended to 30 June 1995, the time-limit for the filing of an application;

Whereas, on 15 June 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia, to order:

> "[That I] be reinstated as a staff member of the United Nations and respectfully request the Tribunal to rescind the decision of the Chief of Russian Translation Section (...) accepted by the Personnel Office and transmitted to me in a memorandum dated 29 December 1992 not to renew my contract or offer a new one and to direct [United Nations] Geneva Office to reinstate me as a United Nations staff member.
>
> ...
>
> 6. ... payment of salary lost during the period of unemployment between the expiry of my contract and the reconstitution of my career;

7. ... my reappointment as staff member retroactively [to] 8 February 1993;

8. In the event of compensation being paid in lieu of reappoint[ment], I request the granting of award in the amount of two years' net base salary."

Whereas the Respondent filed his answer on 2 January 1996;

Whereas the Applicant filed written observations on 26 March 1996;

Whereas, on 1 October 1996, the Applicant filed an additional document with the Tribunal;

Whereas the facts in this case are as follows:

The Applicant entered the service of the Organization on 8 January 1989, on a one-year fixed-term appointment as an Associate Translator in the Conference Services Division, Russian Translation Section, at the United Nations Office in Geneva (UNOG), at the P-2, step I level. His Letter of Appointment stated that he was "on secondment from the Government of the Union of Soviet Socialist Republics". His Personnel Action Form dated 30 July 1991 states that "as from 1.8.91 staff member is holding a fixed-term appointment without a secondment basis".

The Applicant was promoted to the P-3 level on 1 August 1991 and his functional title was changed to Translator. By memorandum dated 4 December 1991, the Chief of the Russian Translation Section informed the Chief of the Languages Service that he recommended that the Applicant's fixed-term appointment be extended for one year. He also stated that the Applicant's performance "has shown some improvement of late in certain technical fields" but that "his progress has been slower than desired".

In a memorandum dated 27 November 1992, to the Chief of the Languages Service, the Chief of the Russian Translation Section did not recommend the renewal of the Applicant's fixed-term contract that was to expire on 7 January 1993. He stated that the

Applicant's performance "continues to be totally inadequate, having in fact deteriorated in the recent past". The Chief of the Languages Service informed the Chief of the Personnel Service of this recommendation on 10 December 1992. As the UNOG Personnel Service did not receive this recommendation until 14 December 1992, the UNOG Administration granted the Applicant a one-month extension, through 7 February 1993, in order to allow him to prepare for his departure.

During his service, the Applicant received four performance evaluation reports (PERs). His first PER, which covered the period from 8 January 1989 to 18 August 1989, evaluated his overall performance as "good".

The staff member who became Chief of the Russian Translation Section was the First Reporting Officer (FRO) in the next three PERs. In the Applicant's second PER, which covered the period from 19 August 1989 to 31 December 1990, the FRO rated the Applicant as "good" and the Second Reporting Officer (SRO) rated the Applicant as "very good". In the second PER, the FRO observed: "while only fair at the beginning of the reporting period, his quality of work has lately become noticeably better". In the Applicant's third PER, which covered the period from 1 January 1991 to 29 February 1992, the SRO evaluated the Applicant's quality of work as "good". However, the FRO noted as a "Special Comment" that the Applicant's performance "still leaves much to be desired" and that he had to "do a lot to improve his work if he is to become a full-fledged UN translator". In the Applicant's fourth PER, covering the period from 1 March 1992 to 31 December 1992, the SRO rated the Applicant with an overall "4. Fair". The Director of the Division took note of the report. The Applicant, in describing his work, indicated that he performed translations on "any type of United Nations documents". The FRO disagreed, indicating that several categories of documents, particularly important or urgent ones, had never been given to the Applicant for translation. The FRO noted, in

paragraph 16, again as a "Special Comment", that "[the Applicant] has reached the ceiling in his professional growth. The present level of his performance is clearly inadequate". On 4 February 1993, the Applicant wrote to the Administrator, Personnel Service, contesting the performance ratings given to him by his supervisor. A Rebuttal Panel was convened on 23 April 1993 to examine the Applicant's case.

On 16 March 1993, the Applicant wrote to the Director-General, UNOG, requesting a review of the administrative decision not to renew his contract beyond 7 February 1993. He repeated that request to the Secretary-General on the next day.

On 17 May 1993, the Rebuttal Panel submitted its report to the Director of the Conference Services Division. It recommended that no change should be made in the Applicant's PER. However, the report pointed out certain procedural irregularities on the part of the Chief of the Russian Translation Section. These consisted of excerpts of certain memoranda by the latter relating specifically to the Applicant's performance and which were much more critical than the official PERs, although simultaneous therewith. These memoranda were apparently not shown or copied to the Applicant.

On 7 February 1993, the Applicant's fixed-term appointment expired. On 17 June 1993, the Applicant submitted a further statement in the light of the Rebuttal Panel's report. The same day, he lodged an appeal with the Geneva Joint Appeals Board (JAB) against the decision not to renew his appointment.

On 8 March 1994, the JAB adopted its report. Its conclusions and recommendations read, in part, as follows:

> "Conclusions and recommendations
>
> 38. The Panel concludes that the surrounding circumstances cannot be held as having created a legitimate expectancy of renewal of the Appellant's fixed-term appointment.

39. The Panel concludes that, despite certain procedural irregularities, there is no evidence to indicate the decision of non-renewal of the Appellant's fixed term appointment was motivated by prejudice, abuse of power or extraneous factors.

40. The Panel further concludes that the length of notice given to the Appellant of the decision of non-renewal of his fixed-term appointment was not in conflict with the Staff Rules and that it did not affect his rights to remedial action under the Staff Rules.

41. The Panel finally concludes that the Administration's delay in circulating to the staff members of the UNOG information concerning the amendment to staff rule 111.2 (c) deprived the Appellant of the right that was available to him as of 1 January 1993 pursuant to the amendment.

42. Taking into account the procedural irregularities referred to above, and considering that the delay in circulating the amendment to staff rule 111.2 (c) had deprived the Appellant of his right under the amended staff rule 111.2 (c), the Panel recommends that the Appellant be compensated in an amount equivalent to three months' net base salary at the rate in effect at the date of separation.

43. The Panel makes no further recommendation in support of this appeal."

On 9 May 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed him as follows:

"The Secretary-General has also noted but is not in agreement with the Board's conclusion that the timing of the circulation in Geneva of an amendment to the Staff Rules regarding the filing of a request for suspension of action had an adverse effect in your particular case. If you had filed a request for suspension of action, it would not have been effective. The granting of such a request in a case of non-extension of appointment requires the Secretary-General to take a positive action, namely to extend the appointment. The Secretary-General has determined that this type of action is not within the parameters of the request for suspension provision.

The Secretary-General, however, has noted the recommendation of the Board that procedural irregularities be taken into account in your case. He has decided to accept its recommendation that you be paid an amount equivalent to three months' net base salary at the rate in effect at the date of your separation from the Organization."

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectation of renewal of his contract.

2. The decision not to renew the Applicant's contract was arbitrary and vitiated by prejudice and mistake.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right under his fixed-term appointment nor the legal expectancy of continued employment with the United Nations.

2. The decision not to renew the Applicant's fixed-term contract was not motivated by prejudice, abuse of power, arbitrariness, improper motive or other extraneous factors. Nor was the Applicant a victim of discrimination.

3. The delay in circulation of staff rule 111.2 (c) did not violate the Applicant's rights since that rule could not have been used to seek an extension of the Applicant's appointment.

The Tribunal, having deliberated from 23 October to 21 November 1996, now pronounces the following Judgement:

I. The Applicant appeals the decision of the Secretary-General not to renew the Applicant's fixed-term appointment. He seeks reinstatement or, alternatively, two years' net base salary. The Joint Appeals Board (JAB) recommended that, in view of the procedural irregularities in the Applicant's case, he be compensated

in an amount equal to three months' net base salary. The Secretary-General accepted this recommendation and paid the Applicant three months' net base salary as compensation. The Applicant appeals this decision to the Tribunal.

II. Because the Applicant complains that the decision not to renew his contract arose from factors unconnected to his job performance or conduct, it is necessary, first of all, to examine his performance, as reflected in his performance evaluation reports (PERs). There are four PERs, the last three of which were signed by the Chief, Russian Translation Section, against whom the Applicant makes allegations of arbitrariness, capriciousness and lack of truth. The first PER, of 17 November 1989, was entirely positive. The second PER was also positive, but the following two PERs, of 16 March 1992 and 22 December 1992, stated, respectively, that the Applicant's performance still left much to be desired and that his level of performance was clearly inadequate. While the Chief, Russian Translation Section, recommended extensions and a promotion at various stages in the Applicant's career, by November 1992, his view was that the Applicant's performance was totally inadequate. Therefore, he recommended that the Applicant's fixed-term contract be allowed to expire on 7 January 1993.

III. The Tribunal finds nothing in these PERs, taken in conjunction with the various recommendations of the Chief, Russian Translation Section, to suggest dishonesty or arbitrariness on the part of the Chief. On the contrary, because the various reports contain some positive references and favourable recommendations, it can scarcely be suggested that there was bias or partiality.

IV. The Applicant suggests that the Chief acted in a way which was adverse to him and failed to recommend his renewal because the

Chief wished to replace the Applicant with other staff members who would be totally beholden to him. The Rebuttal Panel was of the view that there was a remarkable turn-over of staff members in the Russian Translation Section. The Chief's response, in effect, is that he was attempting to streamline and increase the efficacy of the Russian Translation Section. There is no evidence to disprove such an assertion.

The Tribunal, therefore, finds that the recommendation against renewal of the Applicant's contract was properly based.

V. However, the matter does not end there. There were documents in existence relating to the Applicant's work that were not made available to him and of which he was not aware. The JAB, quite properly, was of the view that failure to reveal to the Applicant adverse memoranda relating to his performance constituted a breach of procedure and practice.

VI. The Applicant also contends that the late circulation of staff rule 111.2 (c) made it impossible for him to exercise a right to request the suspension of the decision not to renew his appointment. In contrast, the Respondent argues that the Applicant had a fixed-term appointment which expired automatically and that, in such circumstances, there is nothing to suspend pursuant to staff rule 111.2 (c).

The Tribunal believes that the Respondent's argument is somewhat pedantic. While the decision was one not to renew, the decision, in itself, was a positive action. The rule must surely be equally applicable both to such a decision and to a decision to terminate a staff member's employment. If it were otherwise, staff members whose contracts are not renewed would be at a disadvantage vis-à-vis those staff members whose contracts are terminated.

The fact that the staff rule, which came into effect on 1 January 1993, was not circulated until after the date of expiration of the Applicant's contract, placed him in a position where he could not avail himself of this rule. The Applicant also complains of inadequate notice of non-renewal of his contract.

VII. The Tribunal finds that the Applicant did not have a legitimate expectation of renewal of his appointment and that he was given reasonable consideration for renewal.

The Tribunal concludes, nonetheless, that the Applicant was placed at a disadvantage for several reasons.

Firstly, because not all relevant documents were made available to him, it could be argued that the Applicant was not sufficiently forewarned of deficiencies in his performance, and consequently, was not in a position to make efforts to improve his performance. However, such disadvantage is minimized because, as the JAB found, the Applicant received other warnings that should have put him on notice that his performance was not entirely satisfactory.

Secondly, the Applicant should not have been deprived of the opportunity to avail himself of the provisions of staff rule 111.2 (c).

Thirdly, on purely humanitarian grounds, after four years of service, the Applicant should have been given more substantial notice that there was not to be a renewal of his contract.

VIII. The Tribunal, therefore, orders that the Applicant be paid six months' net base salary at the rate in effect at the date of his separation, in addition to the three months' salary recommended by the JAB and accepted by the Secretary-General.

All other pleas are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 12 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary